Forest Hills Supermarket, Inc. d/b/a Forest Hills Family Foods *and* United Food & Commercial Workers Union Local 880. Case 8–CA–37666

September 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The General Counsel seeks a default judgment in this case on the ground that the Respondent failed to file an answer to the complaint. Upon a charge filed by the Union on March 6, 2008, the General Counsel issued a complaint on May 30, 2008, against Forest Hills Supermarket, Inc., d/b/a Forest Hills Family Foods (the Respondent) alleging that it had violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On July 3, 2008, the General Counsel filed a Motion for Default Judgment with the Board. On July 8, 2008, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On July 21, 2008, the Respondent filed a brief in opposition to the Board's Notice to Show Cause, a motion to file an answer to the complaint, and an answer. On July 22, the General Counsel filed a response in opposition to the Respondent's motion to file an answer. On July 23, 2008, the Union filed a brief in support of the General Counsel's motion.

Ruling on Motion for Default Judgment[1]

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that the answer had to be received by the Regional Office on or before June 13, 2008, or postmarked on or before June 12, 2008, and that, if no answer was filed, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated June 23, 2008, notified the Respondent that, unless an answer was received by June 30, 2008, a motion for default judgment could be filed. The Respondent neither filed an answer to the complaint nor requested an extension of time to do so.

In its opposition to the Board's Notice to Show Cause, the Respondent states that, when the complaint was served, the answer date was not docketed and the Respondent failed to file a timely answer. The Respondent further asserts that when the Regional Office wrote to the Respondent extending the answer deadline to June 30, 2008, the answer date again was not docketed. In addition, counsel for the Respondent states that his wife was hospitalized due to a stroke beginning June 28, 2008, and that some matters, including the answer to the complaint, were neglected because of his absence.

We find that the Respondent's failure to file a timely answer has not been supported by a showing of good cause. The proffered reason for the Respondent's failure to file an answer is, in essence, that its counsel neglected to docket the initial and extended due dates set by the Board for receipt of the answer. The Respondent does not assert that its counsel failed to read the complaint or the Regional Office's letter extending the answer's due date, much less that such failure was for good cause. Rather, Respondent asserts that its counsel neglected to docket the initial and extended due dates. Neglect to docket a due date for an answer does not constitute good cause for failure to file a timely answer, and here the Respondent neglected to docket both the initial due date and the extended date.

Moreover, even if we accept the unverified assertions that the Respondent's counsel was absent from his office after the Region's June 23, 2008 letter, the Respondent fails to specify the extent of this absence (be it hours, days, or weeks). The Respondent only cites an absence after its counsel's wife was hospitalized 2 days before the extended deadline. The Respondent does not show that the counsel's absence, rather than the preexisting and unexplained failure to docket the prescribed due dates, caused it not to file a timely answer or request for additional time. Therefore, we find that the Respondent's asserted reasons for failing to file an answer to the complaint do not constitute good cause.[2]

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] See *Elevator Constructors Local 2 (Unitec Elevator Services Co.)*, 337 NLRB 426, 427 (2002) ("inattentiveness or carelessness, absent other circumstances or further explanation, will not excuse a late filing"); accord: *King Courier*, 344 NLRB 485 (2005); see also *Frank J. Foronjy & Sons Electric Corp.*, 304 NLRB 486 (1991) (unexplained failure of respondent's prior counsel to record properly new date for filing answer did not constitute good cause).

While Chairman Schaumber believes that it is preferable to decide cases on the merits, he agrees that default judgment is appropriate here.

Accordingly, we deny the Respondent's motion and reject the answer that it filed in response to the motion for default judgment. In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's motion for default judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation, with an office and place of business in Cleveland (herein Respondent's facility), has been engaged in the retail grocery business. Annually, in the course and conduct of its business, the Respondent purchases and receives goods valued in excess of $50,000 directly from points outside the State of Ohio. We find that, at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Basem Odetallah held the position of the Respondent's president and has been a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act. The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All food store and meat department employees, but excluding regular clerical personnel, managers and other supervisors as defined in the Act.

Since at least February 7, 2001, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and, since at least that date, the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from February 8, 2004, to February 3, 2007, and extended by the Respondent's conduct and mutual agreement through February 2, 2008.

At all times since February 7, 2001, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since on or about September 6, 2007, and through February 2, 2008, the Respondent has failed to continue in effect all the terms and conditions of its collective-bargaining agreement with respect to article II concerning the deduction and remittance of union dues, by not deducting and remitting to the Union dues for some of its employees. The Respondent engaged in these acts and conduct without the consent of the Union.

Since on or about January 1 through February 2, 2008, the Respondent failed to continue in effect all of the terms and conditions of the agreement described in article II concerning the deduction and remittance of union dues by, without Union consent, failing to deduct and remit dues for all of its employees.

Since on or about September 6, 2007, and continuously thereafter, the Respondent has failed to continue in effect all the terms and conditions of its collective-bargaining agreement with respect to article IX concerning the health and welfare coverage and contributions, and article X concerning the pension contributions, by not making the required contributions to the health and welfare and pension funds for some of its employees. The Respondent engaged in these acts and conduct without the consent of the Union.

Since on or about February 1, 2008, and continuously thereafter, the Respondent has failed to continue in effect all the terms and conditions of the agreement described in article IX concerning health and welfare fund coverage, carrier and contributions, and article X concerning the pension contributions, by not contributing to the health and welfare fund, changing the health insurance carrier, and by not contributing to the pension fund for all of its employees. The Respondent engaged in these acts and conduct without the consent of the Union.

The foregoing subjects relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.[3]

This case does not implicate the concerns that he expressed in *Patrician Assisted Living Facility*, 339 NLRB 1153, 1156–1161 (2003).

In finding that the Respondent has not shown good cause, Member Liebman also relies on the Respondent's failure to comply with the Board's Rules and Regulations concerning untimely filings. Sec. 102.111(c) requires that, when a party files a motion requesting permission to file an untimely answer based on excusable neglect, "[t]he specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts." The Board has held that "[t]he signature of an attorney on the motion will not be treated as a substitute for the required affidavit." *Elevator Constructors Local 2 (Unitec Elevator Services Co.)*, supra at 426. The Respondent filed no affidavit with its motion in this case.

[3] The complaint further alleged that, even if a collective-bargaining agreement were not in effect at the respective times, the Respondent unlawfully stopped deducting and remitting union dues, health and welfare fund contributions, and pension contributions for some of its employees since about September 6, 2007, and unilaterally stopped deducting and remitting dues for all of its employees between January 1 and February 2, 2008. The complaint alleges that these unilateral actions violated Sec. 8(a)(5) and (1) because the above subjects are mandatory subjects of bargaining. The Respondent, by failing to file a

On or about January 8, 2008, the Union requested that the Respondent furnish it with the following information:

> The names, hire dates, and hours worked on a monthly basis of all bargaining unit employees for whom the Employer failed to make contributions to the Pension Fund/and or [sic] Health & Welfare Fund.

The information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive bargaining representative of the Unit. Since on or about January 8, 2008, the Respondent has failed and refused to furnish the Union with the information requested by it.

On or about February 7, 2008, the Union requested that the Respondent furnish it the following information:

> 1. All employees' earnings records including hours worked by category for 2007.
>
> 2. Federal form 941 for the four quarters of 2007 and the employees' 2007 W-2's.

The information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive bargaining representative of the unit. Since on or about February 7, 2008, the Respondent has failed and refused to furnish the Union with the information requested by it.

Since on or about February 1, 2008, the Respondent insisted, as a condition of reaching any collective-bargaining agreement, that the Union agree to limit and/or stop an audit of its books and accounts by the Union's pension fund. The above condition is not a mandatory subject for the purposes of collective bargaining. On or about February 1, 2008, in support of the above condition, the Respondent unilaterally stopped withdrawing and remitting union dues, changed health insurance carriers, and stopped health and welfare fund contributions and pension fund contributions, without reaching agreement or lawful impasse. By its overall conduct, including the above conduct, the Respondent has failed and refused to bargain in good faith with the Union as the exclusive bargaining representative of the unit.

CONCLUSIONS OF LAW

1. By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees, within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act.

2. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to deduct and remit employee union dues as required by the collective-bargaining agreement, we shall order the Respondent to deduct and remit to the Union dues, pursuant to valid check-off authorizations, that were not deducted from September 6, 2007, through February 2, 2008, with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[4]

Having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally ceasing to make contributions to the health and welfare and pension funds on behalf of some unit employees since September 6, 2007, and all unit employees since February 1, 2008, we shall order the Respondent to make whole its unit employees by making all such delinquent fund contributions on behalf of unit employees that have not been made since those dates, including any additional amounts due the funds in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979).[5] We shall also order the Respondent to reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded,* supra.

Having found that the Respondent unilaterally changed the unit employees' health insurance carrier, we shall order the Respondent, on request of the Union, to restore the status quo ante that existed prior to its unlawful change in health insurance carriers.[6] In addition, we shall

timely answer, has admitted that the collective-bargaining agreement was extended until February 2, 2008. Therefore, we find it unnecessary to rely on the alternative rationale set forth in the complaint with respect to the period covered by the extended agreement.

[4] See, e.g., *Stackpole Components Co*., 232 NLRB 723 (1977).

[5] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions to the funds during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to any amount that the Respondent otherwise owes the funds.

[6] As the Board stated in *Larry Geweke Ford*, 344 NLRB 628 (2005), "[t]he standard remedy for unilaterally implemented changes in health insurance coverage is to order the restoration of the status quo ante." (cites omitted). The Respondent may litigate in compliance whether it

order the Respondent to make its unit employees whole for any expenses ensuing from the unilateral change in carrier. This reimbursement to employees shall be computed as prescribed in *Ogle Protection Service*, supra.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith by insisting, as a condition of reaching a collective-bargaining agreement, on a nonmandatory subject of bargaining, and by unilaterally stopping deduction and remittance of union dues, changing the health insurance carrier, and stopping health and welfare and pension fund contributions on February 1, 2008, in support of that condition, we shall order the Respondent, on request, to bargain in good faith with the Union.

Finally, we shall order the Respondent to provide the Union with the information requested on January 8 and February 7, 2008.

ORDER

The National Labor Relations Board orders that the Respondent, Forest Hills Supermarket, Inc., d/b/a Forest Hills Family Foods, Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with United Food & Commercial Workers Union Local 880 as the exclusive bargaining representative of the following unit:

> All food store and meat department employees, but excluding regular clerical personnel, managers and other supervisors as defined in the Act.

(b) Failing and refusing to deduct and remit union dues to the Union as required by its collective-bargaining agreement with the Union.

(c) Failing and refusing to make health and welfare and pension contributions as required by its collective-bargaining agreement with the Union.

(d) Unilaterally changing its health insurance carrier.

(e) Insisting on a nonmandatory subject of bargaining as a condition of reaching an agreement and making unilateral changes in support of that condition.

(f) Refusing to provide the Union with requested information that is necessary and relevant to the performance of the Union's role as exclusive bargaining representative of the unit employees.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive bargaining representative of the employees.

(b) Deduct and remit union dues as required by the 2004-2007 collective-bargaining agreement, as extended, and reimburse the Union for its failure to do so from September 6, 2007, through February 2, 2008, with interest, as set forth in the remedy section of this decision.

(c) Make all the delinquent health and welfare and pension contributions on behalf of the unit employees that have not been paid since September 6, 2007, including any additional amounts due the funds, in the manner set forth in the remedy section of this decision.

(d) Make unit employees whole for any expenses ensuing from the Respondent's failure to make the required health and welfare and pension contributions, with interest, in the manner set forth in the remedy section of this decision.

(e) On request of the Union, rescind its change to the carrier providing health insurance and restore the insurance furnished under the carrier prior to the unilateral change.

(f) Make whole unit employees for any expenses ensuing from the unilateral change in health insurance carrier.

(g) Furnish to the Union in a timely manner the information requested by it on January 8 and February 7, 2008.

(h) Within 14 days after service by the Region, post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall du-

would be unduly burdensome to restore the health insurance carrier in effect prior to February 2, 2008. Id. See also *Laurel Baye Healthcare of Lake Lanier, LLC*, 352 NLRB No. 30, slip op. at 1 fn. 3 (2008). If, however, the Union chooses continuation of the unilaterally implemented health insurance policy, then make-whole relief for the unilateral changes is inapplicable. See id. (citing *Brooklyn Hospital Center*, 344 NLRB 404 (2005)). Although Member Liebman dissented on that point in *Brooklyn Hospital Center*, supra at fn. 3, she recognizes that it is extant Board law and, for that reason alone, applies it here.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

plicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 6, 2007. (i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with United Food and Commercial Workers Union Local 880 as the exclusive bargaining representative of the following unit:

All food store and meat department employees, but excluding regular clerical personnel, managers and other supervisors as defined in the Act.

WE WILL NOT fail and refuse to deduct and remit union dues to the Union as required by our collective-bargaining agreement with the Union.

WE WILL NOT fail and refuse to make health and welfare and pension contributions as required by our collective-bargaining agreement with the Union.

WE WILL NOT unilaterally change our health insurance carrier.

WE WILL NOT insist on a nonmandatory subject of bargaining as a condition of reaching an agreement and make unilateral changes in support of that condition.

WE WILL NOT refuse to provide the Union with information that is necessary and relevant to the performance of the Union's role as exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining representative of the unit employees.

WE WILL deduct and remit union dues as required by our 2004-2007 collective-bargaining agreement, as extended, and WE WILL reimburse the Union for our failure to do so from September 6, 2007, through February 2, 2008, with interest.

WE WILL make all the delinquent health and welfare and pension contributions on your behalf that have not been paid since September 6, 2007, including any additional amounts due the funds and WE WILL make you whole for any expenses ensuing from our failure to make the required health and welfare and pension contributions, with interest.

WE WILL, on request of the Union, rescind the change in the carrier providing health insurance and restore the insurance furnished prior to our February 2, 2008 unilateral change of carrier.

WE WILL furnish to the Union in a timely manner the information requested by it on January 8 and February 7, 2008.

FOREST HILLS SUPERMARKET, INC., D/B/A FOREST HILLS FAMILY FOODS